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Supreme Court of the United States

October Term, 1965

No. 815

ELMER DAVIS, JR.,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA

DECISIONS BELOW

The Opinion of the Federal District Court of the United States for the Eastern District of North Carolina in this case, written by Judge Algernon L. Butler, United States District Judge, and an order denying the petition for a writ of habeas corpus were handed down and filed on July 21, 1961.

This case was passed upon by the Supreme Court of North Carolina in 1960, and is reported as STATE v DAVIS, 253 N.C. 86, 116 S.E. 2d 365 (1960).

A petition to the North Carolina Supreme Court for a rehearing was denied on November 18, 1960; and thereafter, a petition for writ of certiorari was filed with the United

States Supreme Court. Certiorari was denied on March 20, 1961. DAVIS v STATE OF NORTH CAROLINA, 365 U.S. 855, 81 S. Ct. 816.

The order of the Federal District Court of the United States for the Eastern District, written by Chief Judge Algernon L. Butler, United States District Judge, denying the petition for a writ of habeas corpus was entered on September 6, 1963. This order is attached as appendix to the Attorney General's Brief.

The U. S. Court of Appeals for the Fourth Circuit affirmed the District Court order on December 8, 1964.

JURISDICTION

Davis attempts to invoke the jurisdiction of this Court and the Federal District Court under the provisions of 28 USCA 2241, et seq., the same being Chapter 153 of 28 USCA, dealing with the issuance of Federal habeas corpus. Davis also invokes the jurisdiction of the Federal Courts by means of an attempted application of the Equal Protection of the Law and the Due Process of Law Clauses of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Davis attempts to bring his case within a portion of the Fourteenth Amendment of the Constitution of the United States, as quoted below:

> "***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

The appropriate portion of 28 USCA 2241 is as follows:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their jurisdictions. The order of a circuit judge shall be entered in the record

of the District Court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—* * * (3) He is in custody in violation of the Constitution or laws or treaties of the United States;".

QUESTION PRESENTED

Was Petitioner's confession, under the circumstances, voluntary and admissible as evidence?

SUMMARY OF ARGUMENT

The Court of Appeals properly affirmed the order of the District Court and in finding the confession voluntary and denying the writ for habeas corpus after giving Davis a full hearing and after consideration of all State records which were introduced by Davis into evidence. In fact, the plenary hearing conducted by the District Court was equivalent to a full blown trial *de novo*. This case has been fully litigated in the State Courts and in the Federal Courts, and the conclusion of the District Court and the Circuit Court that the confession was voluntary is amply supported by all the facts and evidence. Davis was not held incommunicado or denied his Right to Counsel.

FACTS IN CASE

Although the findings of facts set out in the Opinion of Judge Butler appears to be sufficient (Appendix, pp 12-21), the State of North Carolina urges that the evidence adduced at the hearing in the District Court and at the trial in the Superior Court of Mecklenburg County, a copy of which was admitted into evidence as part of the record in this hearing, amply supports findings of facts as suggested below:

Mrs. Foy Bell Cooper was murdered in a Charlotte cemetery in Mecklenburg County on September 20, 1959. (R.p. 7) At the time the murder was committed, Davis was an escapee from a State prison camp serving sentences of seventeen to twenty-five years for robbery and assault with intent to com-

mit rape. (R.p. 20) He was arrested in Gaston County the day after the murder, September 21, 1959, and held in the Belmont jail until policemen of the City of Charlotte came for him and took him to the Charlotte city jail where he remained until October 6, 1959, at which time he signed a statement admitting the commission of the murder. (R.p. 102)

The arrest slip or arrest card for Davis contained the words: "Date: 9/21/59. Hold for Hucks & Fesperman, R-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to use the telephone." (R.p. 110)

The cell was located on the first floor of the jail. (R.p. 163) Its dimensions were 6 x 10 feet. It contained a bunk, toilet facilities and a drinking fountain with running water. The area was well lighted and fans provided ventilation. (R.p. 165-168)

The only person Davis asked to see was Eloise Stowe, his sister. The officers went to her home, at least twice, and advised her that Davis wanted to see her. (R.p. 267) (R.p. 269) She stated she did not know when she could come because of having to care for her children. (R.p. 326) She finally visited Davis once after he had confessed. Davis did not ask to communicate with anyone else during the entire time from the day he was arrested until he confessed. (R.p. 101, 269)

At no time did Davis request counsel. (R.p. 92)

The jail food served Davis consisted of at least two sandwiches twice a day. (R.p. 281, 22) On occasion, upon request, he was brought a hot hamburger. On the day that he returned to Canton with the officers and walked from the suburbs of Canton to the suburbs of Asheville he was given a regular hot breakfast at the home of one of the detectives and he was given another meal in the middle of the day. (R.p. 314, 18) Davis told Dr. Nathaniel Tross, a Negro minister, that he was well treated while in jail and indicated that his food was satisfactory. Detective Hucks gave Davis peanuts, cigarettes and stuff all along while he was in jail (R.p. 22)

A shower facility was available to Davis outside the cells and he did take one shower. He could have had others if he had so requested.

Davis was questioned by officers once or twice a day for thirty minutes to an hour. (R.p. 17) Most of the questioning took place in the daytime and none after eleven o'clock at night. (R.p. 267, 273, 354) He was twice driven past the scene of the crime for the purpose of observing his reactions, and with Davis' consent. (R.p. 18)

Davis undertook to describe to the officers his escape route after he escaped from prison. The officers investigated the theft of certain articles of clothing which Davis had stolen. Davis claimed to have walked along the railroad tracks from the suburbs of Canton to the suburbs of Asheville. He agreed to go to Canton with the officers and retrace his route, in order to locate the places from which he had taken the panties and other clothes. (R.p. 315) One officer walked with Davis about thirteen or fourteen miles along the railroad tracks from the suburbs of Canton to the suburbs of Asheville, but the petitioner was unable to point out landmarks he had theretofore described. He had two regular meals, breakfast and lunch, that day. The shackles were removed from his legs before the walk started.

Questioning by the officers usually took place in the interrogation room, which was an office of the detective department and adjoined the jail. At no time was Davis questioned in his cell. (R.p. 277)

The officers did not threaten Davis. They did not curse or beat him. They did not abuse him either verbally or with physical violence. (R.p. 337, 338, 188) No promises were made to induce any confession. The Cooper murder was not mentioned to Davis from the time he was arrested until October 3 and, then, not again until October 6 when he confessed and signed a written confession. Davis was informed that he did not have to make any statement if he did not want to and that, if he did, it could be used against him. (R.p. 35, 36, 67)

On the day of the confession, Lieutenant Sykes, who had

not seen or talked to Davis before, walked into the room where officers were questioning Davis. After a few minutes conversation, Davis said he would like to talk to the Lieutenant alone. Lieutenant Sykes observed that Davis had a small Testament in his hand, such as is distributed by certain religious organizations whose representatives regularly visited prisoners in the jail. This prompted the Lieutenant, a lay preacher, to inquire whether Davis had been reading the Scriptures. Davis said he had. The Lieutenant asked if Davis had been praying, and he said that he did not know how to pray. The Lieutenant asked Davis if he would like for the Lieutenant to pray, and Davis said he would. The prayer was substantially as follows (pp 257-258 of Transcript—District Court):

> "O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

In a few minutes Davis made an oral confession of the murder and later, voluntarily, went with officers to the cemetery and re-enacted the commission of the crime. He signed a written confession which had been typed out on the basis of his oral confession. The signing of the confession by Davis was witnessed by several officers.

ARGUMENT

An analysis of the facts in this case clearly supports the conclusion that there was no act or circumstance or combination of acts or circumstances which amounted to a violation of due process of law with respect to the making of the confession of murder.

The jail house cell was sufficiently large, well lighted and ventilated. A drinking fountain with running water and toilet facilities were in the cell. A shower was available, on

request, outside the cell. Probably the facilities were superior to those to which Davis was accustomed when not in jail or prison. He seems to complain that in late September and October ordinary tap water was too hot to drink and too cold to take a bath in.

The detention was legal because Davis was an escapee from the State Prison System. Permission, by the State Prison authorities for the detention of Davis by the City of Charlotte Police Department, had been granted.

Davis was not questioned day and night for long periods by relay after relay of officers. The periods of questioning were not long and, according to Davis' own testimony, occurred only about twice a day. He was never questioned after eleven at night. It must be remembered that the officers were not only investigating the murder-rape of Mrs. Cooper, but they were investigating the escape and the larceny of certain articles which Davis had obtained by larceny and robbery. As a matter of fact, the officers did not mention the murder of Mrs. Cooper to Davis from the time of his arrest on September 21 until October 3 and then not again until October 6, the date of the confession.

Davis did not request counsel. The officers, on two different occasions, personally conveyed a message to Davis' sister that he wanted her to come to see him. There was no request to see anyone else.

It is submitted that two sandwiches twice a day supplemented by peanuts "and other stuff" was not such a poor diet, for an idle person doing no work, as to constitute a violation of due process of law.

It is further submitted that Davis' consenting to walk, and walking, thirteen or fourteen miles between Canton and Asheville along what he described as his escape route, in order to show the officers where he stole the panties and other clothes, does not constitute a violation of due process.

There were no threats, no cursing, no bright lights, no

rubber hose, no beatings, and no promises. In fact, Davis states that when he spoke of threats, he meant "cussing". He further defined abusive language as "nigger, nigger". Surely, Davis was not such a sensitive person, after all his years in prison, that "cussing" and being called "Nigger" constituted any degree of fear or coercion.

A glance at the prayer of the Lieutenant, set out above, shows that it was completely innocuous. No attempt was made to reach Davis through any improper appeal to or play upon his religious emotions and beliefs. The praper was offered at Davis' request. In his own words, "I'm part Christian."

Davis is not a respectable citizen suddenly and terrifyingly snatched from his home and rushed to jail for relentless, continuous questioning without rest and food for long periods of time.

Davis is a jailbird with abnormal and repulsive sexual desires. He is more at home in jail than out of jail. He said, "I have been in a lot of jails." In 1943 he was sentenced to two years in prison. Later, he served twelve months for breaking and entering. In 1946, he was convicted on two counts of housebreaking and larceny and fined $2,000 in each instance. About two weeks later, he was convicted again of breaking and entering and larceny and given four to five years. In 1950, he was convicted of assault with intent to commit rape and robbery and given 17 to 25 years, 16 of which remain to be served. He has known solitary confinement in the past. He has escaped from prison on several occasions.

The picture of Davis is not that of a sensitive soul whose proud and independent spirit was broken by eating jail food for 16 days—the usual, ordinary jail food such as all other jail prisoners were receiving—or by being incarcerated in a jail and by being questioned by officers from time to time as to his most recent, in a long series, of criminal activities.

Witness Nathaniel Tross, a Doctor of Theology, who at one

time had been a pastor in a church attended by Davis' family, visited Davis the day after he confessed and talked to him in private for about an hour. Dr. Tross specifically asked if he had been fed properly. Davis told him "that his treatment was very fine and that everybody was courteous and kind to him and that further they asked him if he needed anything like cigarettes or anything like that, and they were very deferential to him in that respect."

Davis contends, on page 7 of his brief, that the District Court's findings of historical facts illustrate a complete disregard of his evidence. What Davis has overlooked in such a statment is the principle that the Court is the trier of the facts; therefore, acting as a jury, the credibility of the witnesses is with the Court.

A comparison of Davis' testimony before the Superior Court of Mecklenburg County, in December, 1959, with his testimony before the District Court in February, 1963, reveals a great phenomenon—his memory for details and events has improved with the years. He now has total recall.

Not once during 41 pages of testimony in the Superior Court did Davis refer to any slapping or physical violence. Yet, in the District Court, such was his theme song. In the Superior Court, he testified the officers sometimes talked with him as much as twice a day. Yet, in the District Court, he played a tune of constant interrogation by numerous police officers at all hours of the day and night.

Davis told three different stories as to which officer "was going to fram hell out of him." In the Superior Court he identified Lt. Coy Sykes as the man. (Transcript, p 119)

In the District Court, Davis identified Capt. McCall as the officer who was going to "fram hell out of me". (Transcript, p 154). Then, when confronted on cross examination, Davis changed his story and identified Detective Porter as the only officer who had made the statement. (Transcript, p 187). Davis even admitted on page 188 of the Transcript that he

had lied in the Superior Court when he testified that the Lieutenant was the officer who made the statement.

The above are only a few of the inconsistencies which appear in Davis' testimony. When the two transcripts are compared, it is obvious that Davis has, during the years since his original trial, formulated a good story pointing toward force, coercion and fear.

Davis complains in his brief that the testimony of his sister, Eloise Stowe, failed to impress the District Court. How could Davis expect such testimony to be accepted. In her own words, she had not seen her brother for many years. She knew he was in jail and only went to see him once. She knew he was being tried for murder, yet she did not go to his trial. She knew the lawyers representing Davis. She had a telephone and did not call them. She was not interested in testifying for Davis until about a week before the hearing in District Court. A period of about four years elapsed before this witness, Davis or his two attorneys considered her testimony germane enough for her to testify. Surely, standing alone, her testimony would be suspect without any consideration of her demeanor on the witness stand.

The State of North Carolina adopts the Opinion and Order Denying Application for Writ of Habeas Corpus, as entered by Judge Butler on September 6, 1963. Not only did the District Court hear testimony of Davis and 12 witnesses, but before the Court was all the records of all prior hearings including records of the original trial in Superior Court, the North Carolina Supreme Court, United States Supreme Court, District Courts and Fourth Circuit.

The application for a writ of habeas corpus was properly denied by the District Court and its conclusion that the confession was the product of a rational intellect and free will, hence not involuntary or obtained in violation of due process, is more than amply supported by the evidence before the Court.

Respectfully submitted,

THOMAS WADE BRUTON
Justice Building
Raleigh, North Carolina
Attorney General of North Carolina

James F. Bullock
Justice Building
Raleigh, North Carolina
Assistant Attorney General

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL — NO. 1302

ELMER DAVIS, JR.)	
)	
v.)	OPINION AND ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS
)	
STATE OF)	
NORTH CAROLINA)	

This is an application for a writ of habeas corpus on behalf of Elmer Davis, Jr., now confined in the State Prison at Raleigh, North Carolina, under a sentence of death imposed by the Superior Court of Mecklenburg County, North Carolina, upon the applicant's conviction of murder while perpetrating the crime of rape.

The basis of the application is the admission of a confession in the state trial which the applicant contends was involuntary and obtained in violation of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution.[1] At the trial objection to the introduction of the confession on this ground was timely made and determined adversely to the applicant. The finding of the trial Judge was affirmed on appeal as supported by substantial evidence. State of North Carolina v. Davis, 1960, 253 N.C. 86, 116 S.E.2d 365, rehearing denied November 18, 1960, cert. denied, 1961, 365 U.S. 855, 81 S.Ct. 816, 5 L.Ed. 819. Thereafter, application was made to this court and relief was denied without a hearing upon consideration of the state court records. Davis v. State of North Carolina, D.C.N.C., 1961, 196 F.Supp. 488. The Fourth Circuit Court of Appeals, 310 F.2d 904, reversed and remanded for a hearing. Accordingly, a

[1] A written confession and several oral confessions were admitted in evidence at the trial. Inasmuch as the evidence reveals substantially similar attendant circumstances, the confessions are treated alike.

plenary hearing was held in order to determine the unresolved issues of fact surrounding the confession.

The facts in the case are sharply in dispute. The evidence offered at the time of trial is set out in the above-cited opinion of the North Carolina Supreme Court and is substantially the same as that produced at the hearing before this court.[2] Upon consideration of the record in the state court and the evidence offered at the hearing, the court finds the following historical facts:

1. On September 21, 1959, the day after the murder of Mrs. Foy Bell Cooper in Charlotte, North Carolina, Elmer Davis, Jr. was arrested and brought to the city jail in Charlotte, where he was held until October 6, 1959, the date of his confession.

2. At the time of arrest Davis was an escapee from a North Carolina prison where he was confined under sentences of 17 to 25 years for robbery and assault with intent to commit rape.[3] He was wearing clothing other than his prison uniform and had in his possession several articles of women's underwear and a billfold containing papers bearing the name of Bishel Buren Hayes.[4]

Davis had been previously convicted of five criminal offenses, including housebreaking and entering, larceny, robbery, and assault with intent to commit rape, and had served three prior prison sentences aggregating 7 to 8 years in addition to his current sentences of 17 to 25 years. He had escaped four times during his several prison terms, resulting in additional prison sentences. Davis was 29 years old. He had

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[2] All of the witnesses who testified at the state trial concerning the confession testified at the hearing on this application, and three additional witnesses: G. S. Ross and Harold Fesperman of the Charlotte Police Department, and Eloise Stowe, the applicant's sister.

[3] These offenses had been committed within two blocks of Elmwood Cemetery, the scene of the Cooper murder.

[4] Hayes testified at the state trial that he had been drinking heavily near Elmwood Cemetery on the day of the Cooper murder and that his billfold, shoes, and socks were taken from him while he was asleep.

completed the third or fourth grade, and from his testimony at the hearing he appeared to be of low average intelligence.

3. Upon taking Davis into custody, the police notified the State's Director of Prisons and obtained permission to hold the prisoner pending an investigation of the sources of the articles found in his possession at the time of arrest and his activities since his escape. At all times from September 21 through October 6, Davis was held under the authority of the North Carolina Director of Prisons and was serving the sentences from which he had escaped.

4. The Charlotte City Jail, where Davis was confined, is an "overnight" jail without facilities for the preparation of hot meals. Prisoners who are held by the Charlotte Police Department for more than a few days are generally confined in the Mecklenburg County Jail in Charlotte, where cooking facilities are available. Prisoners in the city jail are fed twice daily, each meal consisting of two or more sandwiches. While confined, Davis received food similar to that of other prisoners at regular intervals. During one day, he received two hot meals outside the jail and on another occasion received two hamburgers and milk. Periodically, he was provided with peanuts, soft drinks, cigarettes, and like items. On one occasion he informed the officers that he was hungry and they furnished him food. Otherwise, he made no complaint to the jailers who fed him or to the officers who talked with him that he was hungry or that the food was inadequate. Subsequent to October 6, he stated that he had been well-treated in this respect. There was no attempt by the police to weaken the prisoner by inadequate feeding.

5. The cell in which Davis was held was similar to the other cells in the jail, six by ten feet, equipped with a bed, mattress, drinking fountain, and commode. Ventilation was supplied by ceiling fans. Davis was permitted to use a shower bath located near his cell.

6. From September 21 through October 6, neither friend nor relative saw the applicant; however, he was not held

incommunicado and he would have been permitted visitors had they come to the city jail and requested to see him. Davis' sole request for visitors was to see his sister, Eloise Stowe, who lived in Charlotte. The officers to whom he made this request contacted his sister and conveyed this message to her. He made no request for counsel.

7. The investigation into the death of Mrs. Cooper was conducted by the Detective Division of the Charlotte Police Department, under the supervision of Captain W. A. McCall. The Cooper case was specifically assigned to Detectives W. F. Hucks and Harold Fesperman. From September 21 through October 6, Detectives Hucks and Fesperman talked with Davis once or twice daily. The interviews were conducted in the detectives' interrogation room of the city jail during the daytime and were approximately one hour long. Davis was a suspect in the Cooper case from the time of his arrest because of the nature and location of the crime; however, the questions prior to October 3 were directed to his background, the sources of the articles in his possession at the time of arrest, and the thefts and unlawful entries which Davis told the officers he had committed after his escape in the vicinity of Asheville, North Carolina. During this period the officers attempted to verify his statements, and Davis was taken to Asheville and vicinity in order to identify the scenes of the crimes to which he professed. Detective Homer C. Gardner, who had known Davis previously, assisted Hucks and Fesperman in the interrogation of Davis on three occasions.

8. On October 2 Detectives Jack W. Porter and W. O. Holmesberg questioned Davis for a short period of time on two occasions concerning his abnormal sex habits. During the afternoon of October 3 Detectives Porter and Holmesberg asked Davis if he would like to go out for some fresh air. They took Davis in an automobile through the Elmwood Cemetery, the scene of the rape-murder, but failed to observe any reactions.

On the afternoon of October 3 the Cooper case was men-

tioned to Davis for the first time. Detectives Holmesberg and Porter asked Davis if he knew why he was incarcerated. Davis replied that he believed it was because of the death of Mrs. Cooper. He was then asked if he committed the crime and he denied it.

9. On October 5 Davis was interrogated concerning the Cooper case a second time. Detective Hucks asked Davis what he knew about the murder and his whereabouts on September 20. He stated that he was in Belmont on that day. He again denied committing the crime.

10. On October 6, at about 12:30 p.m., Davis was questioned for the third time concerning the death of Mrs. Cooper. He was questioned by Detectives Hucks and Fesperman in the city jail in the office of Detective Lieutenant Sykes. Lieutenant Sykes, who had been on vacation during the period of Davis' confinement, came to his office during the questioning and requested that he be allowed to sit in. Sykes had known Davis' family and had talked with Davis some years before concerning other offenses. Davis was asked if he had anything to do with the murder and if he was in the cemetery on the day of the crime. He was asked where he had discarded his prison clothes and where he had obtained the clothing he was wearing and other items of personal property. Davis stated that he had discarded his prison clothes in the mountains when he escaped. He told the officers where he had obtained the clothing and other effects. He would not answer questions concerning the death of Mrs. Cooper. About 12:45 p.m. Lieutenant Sykes asked Davis if he would like to talk to any of the officers alone concerning the death of Mrs. Cooper. Davis stated that he would like to talk to Lieutenant Sykes. Hucks and Fesperman left the room. Sykes observed that Davis was holding a testament which had been distributed to prisoners by the local churches. Thereupon, the following colloquy occurred:

Sykes: "Elmer, have you been reading the scriptures?"

Davis: "I have."

Sykes: "Since you have been here have you also talked with your Almighty?"

Davis: "I have not; I do not know how to pray. I wish you would pray for me."

Sykes then offered the following prayer:

"O God, You are now a witness to and the watcher over both of us. I have been asked to pray. I want You to be with me in this prayer. I want You to watch over the person that is present with me; also be with me. I do not only ask prayers for myself, I ask for You to be with all people."

After a short period of silence following the prayer, the colloquy continued:

Davis: "I'd like to tell you something."

Sykes: "All right."

Davis: "I killed that woman."

Sykes: "What woman, Elmer?"

Davis: "The woman in the cemetery."

Sykes: "Do you want to tell me about it?"

Davis: "Yes, sir."

11. Davis thereupon orally confessed to the rape-murder of Mrs. Cooper and related the details of the crime.[5] Davis

[5] The oral confession, according to the testimony of Lieutenant Sykes, was as follows:

"He went ahead and related to me how he had gone to the cemetery. He told me how she was sitting on the bench; that he came up behind her and grabbed her and related how he carried her on beyond a large tombstone, and that he laid her on the ground, and that he believed in his opinion that her head had hit the corner of the tombstone; and that at that time he had unnatural relations with her; and that he picked her body up and carried her through a large hole that was in a fence that separated two sections of the cemetery, and carried her to a building and put her through a hole that was in the building and placed her on the floor inside; and that he left, and that she was bleeding when he left, but at the time he thought that she was still living." Transcript, p. 234.

then consented to accompany Sykes, Hucks, and Fesperman to the Elmwood Cemetery where he reenacted the crime.* Upon his return to the jail, Davis was asked by Chief of Police Jesse James whether he had been mistreated or if anything had been done to him that would cause him to make any statement against his own free will. Davis replied, "Chief, I have been treated all right." Davis then repeated his confession and the details of the crime in the presence of Captain McCall and Detectives Sykes, Hucks, Fesperman, Gardner, and Claude E. Davis, Jr., a police stenographer. The confession was typed and read to Davis. He affirmed the truth of the statements and signed the confession. Thereafter, he was taken to the Mecklenburg County Jail and formally charged with the murder of Mrs. Cooper.

12. From September 21 through October 6, Elmer Davis was neither beaten, threatened, nor cursed by the police. At the time of his written confession, he was advised of his right to remain silent and warned that any statement which he made could be used for or against him in a court of law, and he was informed of his right to counsel. The written confession also contained an admission that it was made freely and voluntarily.

---

* Lieutenant Sykes described Davis' reenactment as follows:

"We proceeded under Elmer's directions to a spot in the cemetery. He informed us that that would be about as close as we could get in a car. We stopped the car under his direction, and he led us to a spot in the cemetery. He showed us a fence that he crossed over. The fence at that time had some shrubbery close to it and some small trees with limbs. He told us how he came over this fence. He showed us a cement bench that a lady was sitting on. He said she was an elderly lady and said, 'Her back was to me'; that she was reading a newspaper, and that he crept up behind her and grabbed her. And from the bench, with him leading us, he went possibly twenty-five or thirty feet . . . away and showed us a large tombstone. This tombstone possibly sat about four to five feet high and possibly three feet wide; and on the opposite side of that he told us that's where he dropped her on the ground, and that in his opinion her head struck the corner of this monument. He showed us in the position that her body was laying. He, himself, got on the ground and showed us after 'ripping or tearing', as he described it, a portion of her pants, he showed us the position that he placed his own self on the ground; and at that time the unnatural act takes place.

"He then led us to a large hole in the fence. I think this fence possibly stood about six feet high. The hole was in the center, and it was a good, large hole, and at the top of the fence there was barbed wire. He showed us how he went through the hole. . . . (H)e carried us to a little house that is called a mausoleum and told us that that is where he placed the body.

"After leaving there, he carried us to a piece of shrubbery . . . where he had thrown, I believe, her pocketbook . . . or other effects that belonged to her . . ." Transcript, pp. 235-6.

13. On October 7 Dr. J. S. Nathaniel Tross, a member of the colored race and Davis' former pastor, came to see Davis after reading an account of the confession in a local newspaper. Dr. Tross conferred with Davis privately. Davis told him that he had not been mistreated in the city jail; that everyone was kind and courteous to him; that he was properly fed, and that his statements, written and oral, and his reenactment of the crime, were voluntarily made. Davis further stated that he was moved by the prayer of Lieutenant Sykes to make the statement concerning the death of Mrs. Cooper.

The foregoing account of the external events and circumstances surrounding the confession constitute the background against which it must be appraised.

The test of the admissibility of a confession is whether "The confession is made freely, voluntarily, and without compulsion of any sort." Wilson v. United States, 1896, 162 U.S. 613, 623, 16 S.Ct. 895, 899. The question in each case is whether the will of the accused is so overborne at the time of the confession that his statement is not the product of a rational intellect and a free will. Reck v. Pate, 1961, 367 U.S. 433, 440, 81 S.Ct. 1541, 1546; Lynumn v. Illinois, 1963, ____ U.S. ____. 83 S.Ct. 917, 920. This question is to be answered with complete disregard of the truth or falsity of the statement. Rogers v. Richmond, 1961, 365 U.S. 534, 81 S.Ct. 735.

As was said in Haynes v. State of Washington, 1963, ____ U.S. ____, 83 S.Ct. 1336, 1344, "The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly * * * where it is necessary to make fine judgments as to the effect of psychological coercive pressures and inducements on the mind and will of an accused."

The concept of "voluntariness" has a two-fold aspect—the internal state of mind of the accused, and its effect when tested by legal standards. In determining the issue of voluntariness it becomes necessary, first, to recreate the mental state of the accused by inferences drawn from the historical

facts in order to determine how he reacted to the events and occurrences surrounding the confession; and, second, to apply the proper legal standards to the particular mental state thus recreated in order to determine the legal significance of how the accused reacted.[7]

The historical facts found in this case disclose that Davis is not a youthful, inexperienced, mentally defective or impressionable defendant, but on the contrary is an adult of mature years who has been convicted of several serious felonies and has been in prison almost continuously for the past sixteen years. At the time of his arrest as an escapee he was currently serving a 17 to 25 years sentence for robbery and assault with intent to commit rape.

He had had extensive experience with police procedures and was accustomed to prison confinement. His arrest and imprisonment as an escapee did not result in sudden separation from family and friends. His status as an arrested escapee distinguishes him from the ordinary suspect confined for interrogation and investigation. He was provided the customary food and accommodation supplied other prisoners. Considering his inactivity during the sixteen-day period, it cannot be said that the food was inadequate to sustain him.

Although Davis was interrogated daily, the questioning was not prolonged nor was it conducted by relays of officers.[8] On the contrary, only five officers questioned him prior to October 6, and the Cooper case was not mentioned until October 3. On the day of the confession Davis had been questioned approximately 15 minutes when Lieutenant Sykes offered his prayer. The prayer resulted from Davis' request and not from preconceived design. It was a simple supplication and, although Davis stated he was moved by the prayer, it cannot be inferred under all the circumstances that the prayer acted upon his religious hopes and fears so that the confession was the product of psychological coercion.

[7] See the discussion in Part IV of the opinion of Justice Frankfurter in Culombe v. Connecticut, 1961, 367 U.S. 568, 603, 81 S.Ct. 1860, 1879.

[8] Compare Turner v. Pennsylvania, 1949, 338 U.S. 62, 69 S.Ct. 1352.

It is a significant fact that, on the day following the confession, Davis told his former pastor during a private conference that he had been well-treated and that his confession was voluntary.

The Court concludes from the totality of circumstances in this case that the confession was the product of a rational intellect and a free will, and hence not involuntary or obtained in violation of due process.

The application for a writ of habeas corpus is hereby denied.

This 6th day of September, 1963.

s/ Algernon L. Butler
Chief Judge, U. S. District Court